

Fred C. Zacharias—Reminiscences

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Many of Fred's friends and colleagues will have written here about Fred's core qualities as a man and a scholar: his ethical integrity and high-mindedness, his devotion to justice, his attention to detail, his ironic and self-deprecating sense of humor, and more.

Fred's last months were awash in these qualities, and he faced death with courage undaunted and incredible dignity. He had not been ready to leave us; indeed he was entering what would no doubt have been the crowning years of the life he had worked hard to achieve. He was comfortable financially and looked forward to spending time traveling the world with Sharon, his wife. His two sons, Blake and Eric, had proven themselves as students, and he was looking forward to following their careers and to mentoring and enjoying their personal growth. He had established his scholarly reputation and looked forward to reaping the rewards of academic accomplishment, and perhaps even to taking the sorts of intellectual risks that had been tempered by years of establishing expertise. He had really not thought about death, and yet, as it suddenly loomed, he changed his mindset and prepared to make the transition from this life as smooth and easy on all his loved ones as such transitions can be.

Inasmuch as I grew up with Fred—I was his first roommate, and we shared living quarters on and off until he finished law school—I thought it appropriate to share here some observations about Fred's becoming that person his family and colleagues knew.

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Fred's devotion to justice evolved perhaps conventionally, from experiencing injustice on a personal level to empathizing with others as he matured. Discrimination was a case in point. Our parents, both Jews, emigrated from Central Europe during the Nazi occupation. Our father was run out of Germany mid-career, and our mother's family had to give up its business and begin anew in the United States during the war. So even though Fred and I suffered little religious or ethnic discrimination growing up, we were both well aware that such things happen, reminded occasionally by the anti-Semitism directed against our father in his practice of law.

Fred's earliest protests against discrimination took root at home. In later years it would become a source of amusement, but as a child Fred's earliest legal briefs began with the words, "Just because I'm six years younger," for that was our age difference. He relied on this refrain to argue against dissimilar bedtimes, dissimilar pay scales (our respective allowances), dissimilar freedoms of movement (going to the movies or traveling around the city), et cetera. For the most part our parents and grandparents held fast to their decisions, but not without having to demonstrate on a frequent basis that the invocation of age differences was not merely arbitrary but rather justified by some element of safety or maturity. The simple promise, "When you're that age, you too will enjoy those privileges," was hardly sufficient balm for Fred. And no doubt the times he prevailed in his arguments infused him with the sort of optimism that would later found his love of the law.

In grade school Fred encountered a more unusual form of discrimination, one that my former classmate Ely Zimmerman terms "alphabetism." For some reason I had not taken it as personally as Fred. Perhaps I had more consoling companions, like Ely, Jeff Winant, Frank Weissbarth, and others with whom to commiserate. Besides, I liked our last name and, insofar as our mother's maiden name is Zivy, felt the end of the alphabet as home and so was prepared to suffer the consequences. Fred, on the other hand, took it as an injustice when his sixth grade teacher, who was not open to reasoned discussion, persisted in giving students at the front or top of the alphabet their choices on all assignments. When finally she broke her promise to Fred to start at the other end of the alphabet in assigning the last project of the year, Fred went on strike and called for others similarly situated to do likewise. The teacher threatened to flunk him out of school, but Fred stood his ground. In the end my parents and I spent an evening in the library cobbling together notes for his report and the school principal, a wonderfully wise old lady, intervened on Fred's behalf.

He and I often laughed about these earlier episodes, but in retrospect, I can see that it was the start of a maturing process that took him from seeing discrimination, or injustice, from a strictly personal viewpoint to understanding it as something broadly significant. Fred's combativeness was part of a lifelong pattern: he simply had little patience for arbitrary authority, so in discovering the law later on, he also found a meaningful instrument to manage his frustrations, on his own behalf as well as those of others. It was around that time that I moved away from home to attend college. My constant presence as the "older brother" and roommate had no doubt been oppressive, and sure enough when I left, Fred flourished and steadily turned into the person he wanted to be.

Recently I had occasion to clean out the closet we shared growing up and came across his first truly legal argument, namely, his conscientious objector files, some four inches of correspondence, "briefs," and evidentiary attachments. Even at the age of seventeen it was clear that he was destined to be a lawyer. The style of his claim to conscientious objector status is characteristic of his lifelong approach to the law, elaborating deeply held convictions—"absolutes" as it were—to justify a range of outcomes, from the most serious to the surprisingly mundane. The Selective Service (Draft) Board had two concerns: one was on the nature of his objections to war or military service, the other was on the sincerity of his convictions. Fred explained his objection in terms of "three basic tenets":

The first, quite simply, is that human life must be held in *supreme* reverence, and all else must be subordinated to its preservation. The taking of this life, for any reason, is criminal, and must *at all costs* be avoided.

The second tenet is somewhat more complex. Each man is responsible for his actions. The individual bears direct responsibility for cause and effect; that is to say that every movement he makes, whatever the outside influences, orders, etc., is directly tied to him and he thus participates in forming his future (and conversely his future depends on his actions). He must thus bear the guilt for all his actions and can in no way transfer the responsibility.

The third tenet . . . requires that man's way of life be directed toward humanitarian ends[, that is,] any goal that would improve life on this earth . . . and would include or engender love and respect for human existence.

He then went on to show how he had adhered to these tenets and how military service would violate them. The Draft Board was not easily persuaded, so the case dragged on for several years until President Nixon declared an end to the Vietnam War. The Draft Board, which was in the process of being dissolved, notified Fred that all petitions still pending

would be abated. Fred, however, insisted on a hearing to vindicate the issue of his sincerity. The Draft Board reluctantly reconvened so that Fred could present in person. After the hearing, the chairman wrote Fred to *thank* him for getting the board to hear his case and praised him for his remarkable eloquence and sincerity. Curiously, the conscientious objector issues would become the focal point for Fred's first experience as a professional advocate, though in quite a different context.

As the draft process had dragged on, Fred rushed through college, graduating from Johns Hopkins in five semesters at the top of his class. He was fortunate there to have as teachers such men as Alpheus Mason, David Donald, and Garry Wills. By the time he began law school, his intellectual skills were well honed, his writing evincing the crisp self-confidence of someone well along in his professional life. He was eager to put his talents to good use and found a happy place for them in Yale's clinical program working with the Legal Services Organization on prison cases.

Fred's first assignments were to assist prisoners in the Federal Correctional Institution at Danbury to resolve disciplinary and probation issues. Working with the prisoners exposed Fred to a variety of interesting stories and developed his empathy for forms of discrimination he had never encountered before. His two "big" cases revolved around the rights of prisoners to grow beards—in the days before Fred grew one himself. The cases grew out of First Amendment Free Exercise Clause claims and involved questions about the sincerity of the prisoners' religious convictions as well as the discriminatory impact of the warden's regulations limiting beards.¹ Because both cases led to reported opinions, there is little need to rehearse the details here, only to note that Fred's team prevailed in both cases and expanded the Danbury prisoners' religious privileges significantly.

There was one peculiarity in the first case, however, that, together with some of Fred's later work, would become a subject of our conversations in years to come. I believe that these conversations were somewhat revealing about the man Fred had become, so I will digress.

The prisoner in the first Danbury case had escaped custody, been recaptured, and at that point became a religious convert, taking the "Vow of the Nazarite," which prohibited him from shaving.² One of the warden's concerns was prisoner identification, and for that reason his code prohibited prisoners from growing beards *after* they had been

1. See *Moskowitz v. Wilkinson*, 432 F. Supp. 947 (D. Conn. 1977); *Maguire v. Wilkinson*, 405 F. Supp. 637 (D. Conn. 1975).

2. *Maguire*, 405 F. Supp. at 638.

incarcerated.³ Why, I asked Fred, did the warden not make a stronger argument about the code—to wit, that it was aimed precisely at the kind of prisoner in question who had proven himself a serious escape risk, religious convictions notwithstanding? Fred responded that they had been ready for such an argument: inasmuch as the warden had photos of the prisoners in their beardless states, the subsequent growing of a beard would not raise serious identification issues if a prisoner escaped again and tried to change his identity by shaving; if anything, those prisoners who had arrived in prison wearing beards and whose photos showed them with beards posed more serious identification risks. The argument served to underscore the arbitrariness of the warden's code. Nevertheless, I went on, it seemed that the warden needed help, in the first place in writing a better code for his prison, then in enforcing the code, and finally in supporting his decisions with more effective arguments in court. Fred shrugged his shoulders: "Everyone is entitled to a lawyer—I happened to represent the prisoner."

Fred felt very strongly about the right to representation. It is not that I objected to that right, but for my part I felt the lawyer could, and should, choose his clients. What was Fred's attraction to representing criminals, whether in the form of prisoners or, as he did following law school, criminal defendants?⁴ After all, there was nothing in either of our backgrounds to foster sympathy for criminal behavior, and Fred in his personal life adhered to the law almost rigidly: no drugs, no drinking and driving, no tax dodges, none of the little evasions in which many of us indulge ourselves that are, strictly speaking, "against the law." Indeed, Fred did not have much sympathy for the criminality of his clients at all. His arguments always came back to the "right to effective counsel" and the sense that, without it, most of his clients would have been overmatched and punished disproportionately by the system. Prosecutors and prison wardens were not about fairness, and so taking on the role of effective counsel was his way of rendering the system less arbitrary, less oppressive, and, ultimately, more just.

Fred practiced in the Georgetown public defender clinic for two years and then went on to practice for three more years with the public interest

3. *Id.* at 640.

4. Following his graduation from law school, Fred accepted a Prettyman Fellowship at Georgetown Law School. He taught there in the clinical program and defended those accused of crimes.

law firm, Dobrovir, Oakes & Gebhardt, in Washington, D.C., working on a mix of civil and criminal cases.⁵ In many of the cases he represented clients who were in one way or another being beaten down by the government or related political forces.⁶ These were the beginning of the Reagan years. During this time he also met Sharon, his wife, and it became clear to him that the demands of the kind of law practice he envisioned would not balance well with the kind of family life he envisioned. So gradually he reoriented his service to the law by becoming the teacher and scholar we all knew.

When Fred began to face death, he no doubt thought about his legacy. As I suggested at the outset, he was intrepid and uncomplaining to his last dying breath. Throughout his life Fred had never played up his own accomplishments: when we spoke he was always talking about Blake's or Eric's achievements—that they made the soccer or tennis or lacrosse team, that one of them had scored a goal or written a decent college essay. He was the model of a proud papa. In his last months his main concern was not that his life's work was being cut short but that he was not going to be around to share in his family's life. So I speak for Fred's family as well as myself in saying that we are very grateful to the editors of the *San Diego Law Review*, as well as Fred's colleagues at the University of San Diego School of Law and the contributors to this issue, for seeing to it that Fred's accomplishments are duly noted and publicly recorded. Fred would have had a difficult time admitting it, but he would have cherished the honor.

5. Immediately following law school, Fred spent one year clerking for Judge Edward Cahn of the Eastern District of Pennsylvania.

6. *See, e.g.,* *Horne v. Merit Sys. Prot. Bd.*, 684 F.2d 155 (D.C. Cir. 1982).